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SUPREME COURT OF THE STATE OF LOUISIANA

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STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff–Appellant

vs. NO. 50614

CHARLES A. PATOUT ET AL.
Defendants–Appellees

* * * * * * * * * * * (50617)

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff–Appellant

vs. NO. 50615

VERMILION DEVELOPMENT CO., INC.
Defendant–Appellee (CONSOLIDATED)

* * * * * * * * * * *

BRIEF ON BEHALF OF THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS, ON REVIEW OF DECISIONS OF THE COURT OF APPEAL, THIRD CIRCUIT

* * * * * * * * * * *

D. ROSS BANISTER
CHESTER E. MARTIN
JOHNIE E. BRANCH, JR.

FOR PLAINTIFF
STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS

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JURISDICTION

The Supreme Court reviews decisions of the Courts of Appeal under the authority of Art. VII, Sec. 11 of the Louisiana Constitution of 1921 and LSA-R.S. 13:4450

SYLLABUS

1. "A landowner who buys or makes improvements within an area he knows will be required for a public improvement is entitled to be compensated for the land at an amount no greater than he paid and to be compensated for the improvement at an amount no greater than the salvage value of the improvements." As was enunciated here by the Court of Appeal.

State v. Patout, 236 So. (2d) 40, 48 (1970).

State v. Laird, 219 La. 567, 53 So.(2d) 674, 676, 677 (1951);

Eminent Domain, § 294, 27 Am. Jur. (2d) 105-106;

Eminent Domain, § 175(1), 29-A C.J.S. 748.

2. Land which is available and in demand as a subdivision must be valued in the condition in which it was taken and as it would be bought by a developer.

Parish of Iberia v. Cook, 238 La. 697, 116 So.(2d) 491 (1959)

3. Damages cannot be awarded to a landowner on land which he does not own, since suit can be brought only against "owner" and only the "owner" is assure just compensation.

LSA-R.S. 19:2

Art. 1, Sec. 2, Louisiana Constitution of 1921;

Art. 1, Sec. 19.1, Louisiana Constitution of 1921.

4. Damages to remaining land cannot be based on speculation as to delay in use but must be based upon a before and after valuation.

State v. Mason, 254 La. 1035, 229 So.(2d) 89 (1969).

5. An award cannot be made in an expropriation suit for damage to property not involved in the suit.

State v. Mouledous, 199 So.(2d) 185,192-193 (1967).

SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff–Defendant NO. 50,614

VS.

CHARLES A. PATOUT ET AL.
Defendants–Appellees NO. 50,617

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF HIGHWAYS,
Plaintiff–Defendant NO. 50,615

VS.

VERMILION DEVELOPMENT CO., INC.
Defendant–Appellee (CONSOLIDATED)

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

(Page numbers used, unless otherwise indicated, are those used in the transcript of testimony)

The State of Louisiana, Through the Department of Highways, expropriated certain property in the Parish of Lafayette for the construction of Interstate Highway I-10, which is a new highway across the southern part of the State and running the entire width of the State.

There were three suits filed, one against Charles A. Patout, Lawrence C. Richard, and Albert Richter, and two against Vermilion Development Company, Inc., which corportation was owned by Charles A. Patout, his brother, Eugene Patout, and Lawrence C. Richard. (The first and last named being the defendants in the first suit.)

The three suits were consolidated for trial which was assigned for June 21, 1965. On that date, one of the

suits against Vermilion Development Company, Inc., was settled and the other two suits went to trial, one against Patout and Richard, Docket No. 33,201, and the other against Vermilion Development Company, Inc., Docket No. 33,209, and the Department's appeal of the two cases tried remain consolidated and they are now consolidated before this Court with writs of review granted to the plaintiff and the defendants.

To aid the Court better to understand these cases and the State's appeal from the trial court's judgments, certain summary information is furnished here in a tabular form:

District Docket	Filed	Defendant	Deposit, estimated just. comp.	Demand	Award
33201	11/12/64	Charles A. Patout et al.	[1] 53,800.00	[2] 522,458.54	137,178.00
33209	11/18/64	Vermilion Dev. Co., Inc.	115,350.00	155,900.00	[3] 128,141.00

These two suits were amended by plaintiff for reasons explained later in this Statement of the Case and the Argument.

33201	4/17/65	Charles A. Patout et al.	34,830.00	Unchanged	Unchanged
33209	4/19/65	Vermilion Dev. Co, Inc.	18,074.00	Unchanged	Unchanged

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1 The deposit was actually $64,500.00 but by joint petition and judgment Albert Richter's interest was settled by his withdrawal of $5700.00 and this ended his participation in the suit except for a later attempt to intervene, which failed.

2 Plaintiff filed a peremptory exception denying defendants' right to claim to $206,025.12 as damages to property, upon the ground that the property was not owned by the defendants who claimed in paragraph 5 of their answer. The merits were not expressly judged in the trial court other than the trial court's making an award on this item of $27,601 (pp. 17–18 of Reasons), based upon the defendants' testimony.

3 Based on the state's testimony (pp. 21 & 23 of Reasons), of $124,550.00 and on defendants' testimony (pp. 23 & 24 of Reasons) of $3591.00, which was admitted as a proffer but was never accepted by the court until it was included, without comment, in the award (See pp. 109, 210–211, 215 and 512–513 of Testimony), and was also the object of a peremptory exception.

The first and most serious question facing this Court is a determination of the effect of the fact that the defendants bought the property expropriated only after having their own engineer project lines on a map to show what would fall within the proposed right of way, which they then purchased and upon which they then built five houses.

Although various personnel of the Department had various bits of information which, when assembled, led to the conclusion that defendants bought and built within the proposed highway with full knowledge that the Department would require the area for the proposed highway construction, this was not known to the Department's attorney when he filed the two suits in November, 1964, and when he did learn this, amended petitions were filed in April, 1965, alleging generally that because of defendants' previous knowledge, they were entitled to no more than they had paid for the land taken, which they had acquired in January, 1963, and the salvage value of the improvements built upon part of the land in March and February, 1964, just a few months before it was expropriated.

The Department's position is predicated upon the well established principles that a claimant is obligated to minimize his damage, and that he may not deliberately engage in activities in relation to land he knows will be required for highway construction, either by purchase or by construction, so as to increase the cost of the highway construction to the public.

The defendants' objection to this was sustained by the court but was admitted as a proffer (p. 285).

The Court of Appeal agreed with the State's position and adopted its suggested rule (State v. Patout, 236 So.(2d) 40, 48 (1970) but did not apply the rule correctly.

The Department is in substantial agreement with the trial court's summary of the facts and contentions through page 11 of the court's Reasons for Judgment.

The substance of the Department's position, with which the Court of Appeal agreed, is that the defendants knew with a high degree of certainty exactly where the proposed highway would be constructed and, that they deliberately went about acquiring the land involved and con-

structing five residences on five of the lots they acquired. The Department's position is then that the defendants can claim no more than reimbursement for the land on the basis of their purchase price and that they can claim no more than the salvage value of the improvements they constructed on the land they acquired with knowledge that it would be taken for the highway.

The defendants' position seems to be a mixture of contentions that: (1) they did not know where the highway right of way was to be; that, (2) the Department in some way misled them as to the proposed location of the right of way, though they never suggested any reason for this deception by the Department; and that (3) the Department neglected to warn them to stop the construction, though their own testimony shows clearly that the construction was a forced draft operation in a very short period of time, quite clearly planned for completion before the Department could learn of it and take action to stop it.

The trial court held that the Department's position is correct, and is set out in 27 Am. Jur.(2d) 105. The Court apparently agreed with the Department's contention as to the measure of just compensation as set out in the amended petitions, if ".....the defendants in these cases have acted in bad faith." (p. 12 of Reasons).

The trial court then concluded that the defendants did not act in bad faith, after which it turned to the question of fixing the just compensation which would be due, if the defendants acted in good faith.

Thus, the first question to be decided by this Court, in reviewing the decisions of the Court of Appeal, is the good faith of the defendants in buying and building within the right of way of the proposed highway or, said another way, did they do this with full knowledge?

To determine this question will require a review of the testimony, which is made below, after the reading of, which I feel sure this Court, as did the Court of Appeal, will agree with the Department that the defendants bought property and built within the area involved with full knowledge that it was within the right of way of the new highway. If this Court agrees with the Department on this, it will then, it appears, have no alternative but to fix the award at the amended values submitted by the Department,

and this is exactly what the Court of Appeal did as to the houses but refused to do as to land values and damages. If this Court disagrees with the Department, it will then go on to consider the determination of just compensation outside the question of bad faith of the defendants.

I here summarize the facts relied upon by the Department to show the bad faith of defendants:

1. The advertising and holding of a public hearing on the construction of the proposed highway on October 6, 1959, was stipulated (p. 3 of Reasons) and the purchase of the lots involved was made January 29, 1963 (p. 5 of Reasons) and the five houses were constructed in March or April, 1964 (p. 230 of Testimony).

2. The location of the new highway was made known by radio, newspapers and public hearing (p. 35) and a map was displayed showing approximate location of highway (pp. 35 and 36).

3. Defendants' engineer, Laurent, admitted he was employed by defendants in 1961 to determine and locate on the subdivision map, where the highway would be located (p. 153).

4. Defendants' engineer admitted he knew that the interchange at La 3052 meant there would be a highway constructed westerly (p. 168).

5. Defendants' engineer admitted he projected the proposed highway on the subdivision map from a highway map furnished to him by the defendants (pp. 169, 170, 190).

6. Defendants' engineer admitted he plotted the projected highway for the defendants in 1961 (p. 172).

7. Defendants' engineer admitted he knew and told the defendants (in 1961) that the new highway could not vary substantially from his projection (pp. 173 and 181) and that this turned out to be true (p. 174).

8. Defendants' engineer gave copies of map showing projection, to defendants (p. 181).

9. Eugene Patout (defendant) admitted talking to his engineer about extending highway lines from highway map in 1961.

10. Defendant Eugene Patout claimed that the first information he had about where the highway would be was in July, 1964 (p. 231).

11. Defendant Eugene Patout admitted he built the five houses in March and April, 1964 (p. 230) but also admits that when they were expropriated he began the construction of other houses, none of which were completed a year later (p. 233).

12. Defendant Eugene Patout sold first property in subdivision to Department in 1961, at which time he apparently got map showing additional takings to be made (p. 276).

13. Defendant Eugene Patout admitted he had his engineer extend lines of highway through subdivision in 1961 (p. 284) and claimed that his purpose was to avoid it (p. 285).

14. Defendant Eugene Patout admitted that he knew he was building the five houses within the right of way of the highway as projected by his engineer, Laurent (p. 286).

15. Defendant Eugene Patout admitted that the purchase of the 61 lots was a departure from their customary subdivision development, and defendants' objection to this line of questioning was sustained but proffer was permitted (p. 291).

16. Defendant Eugene Patout claimed he acquired the 71 lots (almost exactly falling within the right of way diagonally across the subdivision) so that he could build more expensive houses away from the cheaper houses (p. 292).

17. Defendant Charles Patout admitted employing the engineer, Laurent, to extend lines of new highway in 1961 (pp. 326, 327 and 330).

18. Defendant Charles Patout admitted he suspected the possibility that the 61 lots he bought were within the right of way of the new highway (pp.328-329).

19. Defendants agreed with vendor of lots to move his house, which was on one of them and within the highway right of way (pp. 334-335).

20. Defendant Richard amitted they bought the 61 lots within the confines of the projection done on the map by the engineer, Laurent. See D-19. (pp. 343-344).

21. Richard admitted he knew the location of I-10 when he repurchased the 56 lots (p. 348).

22. Richard admitted that P-26 is letter dated 1/29/63 indicating he knew lot 299 was within the highway

right of way (pp 347-349).

23. The State's employee who was responsible for the survey of the highway placed a stake on the center line in 1959 at each 100 feet (pp. 642, 645 and 646).

24. Another of the Department's surveyors found the center line well marked with red and yellow flags and stakes so that an engineer would have had no difficulty in locating it (pp. 653-654).

25. A surveyor would have had no difficulty in locating the center line of the highway (pp. 656-657).

26. Defendants' purchase of the 61 lots was a total departure from past practice, which had been to purchase one lot at the time and never more than 20 (p. 661). (Comment: obviously previous purchases had followed the plan of orderly development and the purchase of the 61 lots equally obviously was not in accord with orderly development, but was only the purchase of the lots within the highway right of way).

27. Defendants told vendor of 61 lots that they were buying the lots within the right of way (p. 661) and explained that the reason for buying so large a number was because ".....they wanted to make some money on the Highway Department" (p. 667) and told him they would pay for the lots when the Department bought them (p. 666).

28. Vendor of lots showed the highway stakes to defendants before they bought the lots (pp. 663-664).

29. Defendants sold lots to State in 1961 and said they knew where the right of way was at the time (p.669, 676).

30. State's surveyors worked along the line of survey every year from 1958 to 1964 (p. 677).

31. Defendants agreed to move vendor's house out of the right of way (pp. 662-663) but tried to back out (p. 673).

32. Defendants had a scheme for getting additional profit from the public by building a sewer plant within the right of way (p. 668).

33. Defendants admitted to an employee that they knew the location of the right of way (p. 690) and that they knew that the statement from the letter (D-3) from the Department, indicating that no more right of way was needed, applied only to project for the interchange (pp. 689,

692-693).

34. Department's employee responsible for the right of way appraisal learned for the first time in June, 1964, that the five new houses had been built within the highway right of way (p. 696).

35. The defendants, through their corporation, Vermilion Development Company, Inc., one of the defendants here, earlier sold Parcels 6-2 and 6-5 to the Department, which were house slabs on Lots 67 and 69, on the line marking the westerly limits of the Department's land acquisitions for the interchange connecting State Route 3052 (now La-US 167 to I-10). See sheet No. 6, 2nd sheet of Exhibit P-3.

If this Court agrees with the Court of Appeal and finds that the defendants acted in bad faith, it must then determine whether the development agency contract relieves them of the effect of their bad faith as to land values and alleged damages.

All of the above applied equally to both cases on appeal, and on this writ of review.

ALTERNATIVE QUESTIONS

Now, in the alternative, assuming, for our purpose here, that this Court has agreed with the trial court's finding that the defendants did not act in bad faith, or has agreed with the Court of Appeal's finding that the defendants did act in bad faith but that this affects only the award for the five houses, the Court is then confronted with an ordinary problem of fixing just compensation based primarily upon market value of the property expropriated or damaged by the expropriation.

This valuation problem can best be discussed separately as to the two cases, and should be approached by reference to the above table.

Although the Department's original deposit in the Charles A. Patout et al. Case, District Court Docket No. 33,201, was $64,500.00, one defendant, Albert Richter, withdrew in a joint petition for final judgment based upon the deposit for his interest of $5,700.00, and he is no longer in this suit, though he later unsuccessfully attempt-

ed to intervene. Thus, the original deposit by the Department for the interest of the two remaining defendants, Charles A. Patout and Lawrence C. Richard, is $53,800.00.

Reappraisals of the property expropriated from the two remaining defendants resulted in an increase of the estimate of value from the net of $58,800.00 to $67,133.00 by Stanley Tiger and $73,755.00 by Maurice Chappuis, appraisers employed by the Department, and these appraisals were the State's testimony on values.

Although I have absolutely no doubt that the Court's constitutional right and obligation to fix just compensation, leave it free to fix that compensation at an amount lower than that given in the testimony of the highest amount by an appraiser for the State, I will do no more here than explain that amount as the highest possible figure.

Thus, I will analyze Mr. Chappuis' appraisal, the highest given by the State, and compare it with that fixed by the trial court based on the testimony of Mr. Angers, defendants' appraiser, and the results of the testimony of both will be set out later in tabular form.

Mr. Chappuis' appraisal differs in a major respect from that of Mr. Angers in that Mr. Chappuis valued the property west of the westerly lines of Parcels No. 6-34, 6-35 and 6-36 as acreage with a highest and best use for potential subdivision development and he rejected the idea that it had become a subdivision by mere incorporation on a map as a subdivision but was not otherwise developed (pp.753-754).

Mr. Angers treated Parcel 5-18 as the only potential subdivision area taken and treated Parcels 6-30, 6-23, 6-31, 5-21, 5-22, 5-23 and 5-24 as developed subdivision lots with a slightly lesser value per square foot than the completely developed lots.

In an effort to facilitate the Court's consideration of the value conclusions given by the Deapartment in its highest appraisal, made by Mr. Chappuis, in comparison with those adopted by the trial court, made for the defendants by Mr. Angers, the following tabular form of value conclusions have been extracted from the testimony and the exhibits:

Charles A. Patout et al.

Parcel	Area	Chappuis (for plaintiff) Value Taken	Severance Damage	Total	Angers (for defendants) (The award of the trial court) Value Taken	Severance Damage	Total
6-1-R-1		$1100	$ 580	$1680	$ 905	$ 243	$ 1148
6-7-R-1		95	-	95	155	-	155
6-27		20	-	20	Not included	-	-
6-28 & 6-28-A		6150	570	6720	5748	683*	6431
6-33		1920	-	1920	1800	-	1800
6-34		885	835	1720	828	669*	1497
6-36		1540	-	1540	1438	518*	1956
Subtotal		$11710	$ 1985	$13695	$10874	$ 2113	$12987
6-30	37,831 sq. ft.	3040	Damage to		9836	1507*	
6-23	75,614 " "	6075			18904	1610*	
6-31	55,357 " "	4448	all		13839	906*	
5-22	10,559 " "	848			2640	1330*	
5-21	48,736 " "	3916	remainer		12184	2531*	$16049
5-23	24,272 " "	1950			6068	820*	
5-24	1,515 " "	122	parcels		379	666*	
Streets	2.295 Acres	8045				Included in lot evaluation	
5-18	5.216 "	18256	$13360[3]		16691	(6679[1]	
"						(27601[2]	
Subtotal		$46700	$13360	$60060	$80541	$43650	$124191
Total		$58410	$15345	$73755	$91415	$45763	$137178

1 Owned by defendants
2 Not owned by defendants
3 Damage to remainder of all parcels, 6-30 through 5-18 inclusive
* The damage to partially taken lots owned by defendants, a total of $11483

An examination of the above table reveals that the difference in the award (based on Angers) of $12,987.00 and the State's estimate (based on Chappuis) of $13,695.00 is so slight and all values are so similar for Parcels 6-1-R-1 through 6-36, that no consideration of error should be made in the indicated areas.

It is the valuation of the land and damages on Parcels 6-30 through 5-18 in which the wide divergence appears and in which error on the part of the trial court and the Court of Appeal may be found. Mr. Chappuis' estimade for the latter area is $46,700.00 for the land taken, and $13,360.00 for damages to the remainder (owned by the defendants), a total of $60,060.00). Mr. Angers' estimate (which is the trial court's award) is $80,541.00 for the land taken, $16,049.00 (incorrectly stated in relator's earlier brief as $6,679.00) for damages to remaining land owned by defendants and $27,601.00 for damages to remaining land not owned by defendants, a total of $124,191.00 (more than twice that of Mr. Chappuis).

The State contended in the Court of Appeal that four errors were made by the trial court: (1) allowance of values based on a subdivision which was undeveloped corn field, no more than potential subdivision in its highest and best use, (2) in basing its award for damages on the same value, (3) allowance of damage not based upon "before and after values," and (4) allowance of damages to land not owned by the defendants.

The Court of Appeal made these same errors but did make some slight reductions in the award.

And now, again assuming, in the alternative, that this Court has agreed with the trial court's finding that the defendants did not act in bad faith, or has agreed with the Court of Appeal's finding that the defendants did act in bad faith but this affects only the award for the five houses, this Court is confronted with the ordinary problem of fixing just compensation in the Vermilion Development Company, Inc., Case, District Docket No. 33,209.

The deposit in the Vermilion Case was $115,350.00 for the five houses built on five lots, the purchase of which lots and the construction of which houses the State contends were made in bad faith, with which the Court of Appeal agreed but applied in part only. A reappraisal of the

five houses was made and Mr. Chappuis testified to $124,550.00 for the State, but only in the alternative. This was accepted by the trial court (pp. 21 and 23 of Reasons) and is certainly the maximum award which can be justified by the record.

The trial court made an additional award of $3,591.00 to defendants predicated upon an alleged delay in defendants' completion of a house not within the taken area (p. 23 of Reasons).

Since the house and lot were in no way involved in any of these suits, the State objected to any testimony as to this alleged damage (pp. 109, 210-211, 215, and 512-513), which objection was sustained by the trial court and was never overruled except inferentially by the award. Thus, the State contends that the Court erred in making the award on the grounds that it had already sustained the objection, and, further, that it was error to make the award even if it had overruled the objection, since no matter outside of an expropriation suit may be brought into it, and this is the same error that the Court of Appeal approved in its Per Curiam of April 24, 1970.

SPECIFICATION OF ERRORS

1. The opinion of the Court of Appeal erred in holding that a development agency contract in 1958 relieved defendants of the effect of their full knowledge, when they acquired property in 1963 within what they knew was the right of way for a proposed highway (upon a portion of which they then constructed five houses).

2. The opinion of the Court of Appeal erred in holding that the fact that the defendants, Patout and Richard, had a development agency contract to develop an area for subdivision use, justified affiriming the trial court's award for alleged damages to the remaining area to the defendants as "owners" though they owned no part of it and had no right or obligation to buy it.

3. The opinion of the Court of Appeal erred in affirming the trial court's award of $3,591.00 as alleged consequential damages to a house, no part of which house and lot were included in the expropriation.

4. In the alternative, the opinion of the Court of Appeal erred in amending the trial court's award by reducing it by only $18,850.00, which still affirmed an award on the basis of speculation as to what subdivision lots might be worth when and if the area should be developed and sold as lots.

5. In the alternative, the opinion of the Court of Appeal erred in affirming the trial court's award of $45,763.00 as alleged damages to the remaining property (only a small portion of which defendants owned) based upon speculation of a delay in developing, instead of on a "before and after" valuation.

BRIEF ON SPECIFICATION OF ERROR NO. 1

The Court of Appeal very correctly enunciated the rule of law: "A landowner who buys land or makes improvements within an area he knows will be required for a public improvement is entitled to be compendated for the land at an amount no greater than he paid and to be compensated for the improvement at an amount no greater than the salvage value of the improvements." Citing State v. Laird, 219 La. 567, 53 So. (2d) 674, 676 (1951); Eminent Domain, § 175(1), 29-A c. J. S. 748; Eminent Domain, § 294, 27 Am. Jur.(2d) 105-106.

On the question of bad faith of the defendants in their deliberate purchase of 61 lots and the construction of five houses within the highway right of way, I know no way bad faith can be shown more convincingly than is shown by the testimony of the defendants themselves..

The defendants acquired a map from the Department in 1961 which showed the proposed projection of I-10 from the interchange with State Rouge La 3052 and they had their own engineer project the proposed highway on a map of the subdivision and they then bought the lots which fell within that projection and built five houses upon five of the 61 lots.

The defendants' own testimony makes clear that from 1961 until the expropriation in 1964 they knew exactly or almost exactly where the highway would be constructed and in 1963 they purchased 61 lots so staggered diagonally in their location across the (paper) subdivision as to leave absolutely no doubt that they were acquiring the property with absolute certainty that it would be sold to the State for an enormous profit. (They paid $2000 per acre and the trial Court awarded them 25¢ to 28¢ per square foot, or approximately $10,000 per acre, excluding "streets"). And they even took the precaution of compelling the vendor to wait for his pay until they had the payment from the State, itself clear evidence they knew full well the land was within the highway right of way.

And not satisfied with the profit they planned to get, and have gotten, on the land, profit paid by the public, they had the unmitigated gall to build five houses on five of the

61 lots. And even with this brazen behavior, did they build the standard quality house for the subdivision. No, they built houses of nearly twice the value typical of the subdivision, quite obviously in a final further effort to exact additional profit from the public's efforts to build highways. And the defendants say this is not bad faith and, infinitely worse, the trial court agreed and let them escape their richly deserved retribution. Now this Court is implored to impose justice upon this scheme of the defendants, in accordance with the rule enunciated by the Court of Appeal.

While I have seen many "sales" of land I suspected to be for the purpose of creating large values for land in anticipation of the construction of a highway, and the construction of the Interstate System is especially vulnerable to this because of the requirement of public hearings and total revealing of plans years before they may mature, there is very little jurispurdence on the subject in this State, and not a lot anywhere.

The only case found in Louisiana dealing directly with this sort of problem is State v. Laird, 219 La. 567, 53 So.(2d) 674 (1951).

In the Laird Case the Department of Highways filed suit on June 4, 1947, under the general expropriation statutes (LSA-R.S. 19:1 et seq.) for the expropriation of a tract of land for highway purposes. Under this statute the Department acquired no title, right or interest in the land being expropriated until the judgment of expropriation was granted and the award was paid,[1] which was at least a year later, though the exact date is not given in the opinion.

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1 Defendant ". . . was divested of the ownership of his land only after the judgment of the trial court was rendered, read, and signed, and the deposit was made in the registry of the Court." State of Louisiana, through Sabine River Authority v. Miller, 250 La. 668, 198 So.(2d) 397, 400 (1967).

The original defendant sold the property more than a year after the suit was filed but before it was finally tried and before the judgment was rendered and before the deposit of the award was made. In short, when the property was sold the State had acquired no interest in the property of any kind, with the effect that, by comparison with the matter involved here, defendant-vendor and defendant-vendee had been notified that the ownership of the property was being sought for public use.

The vendee of the property, presumably relying on the fact that his property had not yet been expropriated but with knowledge of the pendency of the suit and before judgment was signed and the deposit made, constructed certain changes in the property. He built a garage and began business in it and made other related changes in the property.

On the trial of the case the defendant-vendee (Habert) was awarded, among other thing, "$300.00 for removing and reconstructing garage; $42.00 for building another driveway to butane tank and reconstructed garage;" and "$750.00 for consequential damages," all of which were denied by the Supreme Court on the ground that when the garage was built and the business in it was begun, the defendant-vendee had knowledge that the expropriation of the property was in prospect.[2]

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2. "Although the record is not clear on whether Habert knew of the pendency of these proceedings at the time he purchased the property, he himself admitted that he knew of them on the day he signed the act of sale, though subsequent to the signing. This knowledge, together with the warning given him by the Highway Department representatives when he began construction of his new garage, certainly bars recovery for removing and reconstructing the same and for rebuilding his driveway. These two items ($300 and $42) will therefore be disallowed.

". . . we hold that appellee's admission that he had built the shop after his purchase, and therefore, after he had received knowledge of the pendency of these proceedings, together with his failure to prove the income of this shop, answers his own contention adversely. The consequential damages, not being proven, cannot be allowed." (Emphasis added) State v. Laird, 219 La. 567, 53 So.(2d) 674, 676, 677 (1951).

I submit that we have, for our purposes here, an exactly parallel situation to that of the Laird Case, supra.

At the time Habert (purchaser of the Laird property) bought and built his garage and began his business on the property to be expropriated, he knew that the property would be or, at least, might be expropriated. On that ground alone, the Supreme Court held that he could not recover for damages to changes he had made in the property after he had that knowledge.

This is exactly the position of the State in this case. The State contends that defendants purchased the property for $2,000 per acre and built five houses upon it, not only with knowledge that it would be expropriated but with absolute certainty that it would be done, and that they did not act upon this knowledge until they had technical assistance from their own engineer in locating and making certain where the acquisition would be.

It does not appear to me that the Supreme Court's decision in the Laird Case, supra, turns upon the question of good or bad faith but merely upon the question of knowledge of the prospective expropriation, which concededly may be a euphemistic description of "bad faith."

The general tenor of the very limited number of decisions in other jurisdictions seems to hinge squarely upon bad faith and the rule is well stated in paragraph 294, Eminent Domain, 27 Am. Jur. (2d) 105-106[3] and in paragraph 175(1), Eminent Domain, 29-A C.J.S. 748.[4]

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3 "Where. . . a building is erected or moved upon land which the owner knows is to be taken by eminent domain, and is placed upon such land in bad faith, with the sole purpose of enhancing the damages and not in the natural, ordinary, and legitimate use of such property, the building remains personal property and should not be considered in determining the value of the real estate." Eminent Domain § 294, 27 Am. Jur. (2d) 105–106.

4 "While one may in good faith purchase or improve land regardless of any probability of a subsequent appropriation for public purposes, no compensation can be recovered for improvements placed on the land for the sole purpose of enhancing the damages to be recovered on a subsequent condemnation." Eminent Domain § 175(1), 29–A C.J.S. 743.

It seems obvious that in a case of this kind, as in most eminent domain issues, the courts have a very difficult task of balancing the rights of the landowners against those of the public to arrive at constitutionally "just compensation."

Here the Court must balance the traditional right of the landowner to do with his land as he pleases, so long as he avoids harm to others, with the public's right to be protected from the exploitation and sharp practices of those who seek to profit unfairly from the public's efforts to furnish needed public improvements.

The courts appear to have struck a balance along the lines of good or bad faith, which appears to be the question of whether the change in the landowner's position, upon which he bases his demand for compensation, was made with knowledge of the future expropriation and for the purpose of exacting more compensation from the public than he would have been entitled to receive had he not made the change.

I submit that where these two factors are present the courts cannot permit the guilty landowner to demand the compensation he would be due had he not had the knowledge and acted to obtain the unfair advantage.

Again, I submit that the actions of all defendants clearly show that they, and each of them, knew that the property they were acquiring and improving was squarely withing the highway right of way and would, of necessity, be acquired by the State. In my view, this is all that our Supreme Court has required to defeat the demand of a landowner in the situation we have here.

But we can and must go on to say that the actions of all the defendants show not only that they acted with full knowledge but that they acted with the intent of increasing their claim against the State.

If the actions of the defendants in this case do not constitute bad faith and defeat their demands, I cannot possibly conceive of actions which would.

The award should be fixed at the value fixed in the amended petitions of plaintiff, $34,830.00 for Charles A. Patout and Lawrence C. Richard, and $18,074.00 for Vermilion Development Company, Inc.

The Court of Appeal held that its enunciated rule reduced the award for the houses to salvage value but also held that since a development agency contract (Exhibit D-38), copy of which is in Appendices) pre-dated defendants' knowledge of the highway construction and the land they acquired in pursuit of the contract long after they knew of the proposed highway construction, with the avowed purpose of "making a lot of money from the State," did not come under the rule, and thus fixed compensation for the land (lots on which the houses were constructed) without regard to the rule. The Court of Appeal then decided that merely because the defendants had entered into an agency contract in 1958 with the owners of land, to develop and sell the land as lots, which contract obligated the owner to accept, as his part of the transaction, compensation of $2,000.00 per acre, the defendants could buy the land, not as part of the development contract but in order "to make a lot of money" out of the State, and then be compensated for the land they bought at $2,000.00 per acre at the rate of approximately $10,000 per acre.

The Court of Appeal apparently decided that, since they might be said to have the right to acquire the property for $2,000.00 per acre, they were then free to do so (though certainly not compelled) even after they knew the property was within the right of way of a proposed highway, and, in fact, acquired it for that reason and no other.

The contract shows not only that the defendants did not obligate themselves to buy the land, it did not even give the right to buy it. The contract was to develop the land and sell the lots and the landowners agreed to accept, at that time, $2,000.00 per acre for the land and to sign the contract of sale.

BRIEF ON SPECIFICATION OF ERROR NO. 2

The Court of Appeal made an award of damages to the agents of the owner just as though the agents were the owners and this violates the plain provisions of the law in that it assures just compensation only to the owners of the property expropriated.

LSA-R.S. 19:2:

"Where a price cannot be agreed upon with the owner, ~~any~~ of the following may expropriate needed property:

"(1) The state or its political corporations or subdivisions created for the purpose of exercising any state governmental powers;" (The other expropriating authorities named are irrelevant here) (Emphasis added)

LSA-R.S. 19:12:

"If a tender is made of the true value of the property to the owner thereof, before proceeding to a forced expropriation, the costs of the expropriation proceedings shall be paid by the owner." (Emphasis added)

Art. 1, Sec. 2, Louisiana Constitution of 1921:

"No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid." (the owner) (Emphasis added)

Art. 6, Sec. 19.1:

"The Legislature shall have authority to authorize the taking of property for highway purposes by orders rendered ex parte in expropriation suits prior to judgment therein provided that provision be made for deposit before such taking with a court officer for the amount of appraisals of the property so taken and damages to which the owner thereof may be entitled, if any, which appraisals may be made

in such manner as may be provided by law either before or after institution of suit, and need not be by judicially appointed appraisers." (Emphasis added)

The concept of agency coupled with an interest does not establish a property right to the land in the agent but merely limits the principal's freedom to terminate the agency, exactly as the agency contract expressly provides. But the agents had a built-in limitation to their obligation: they developed only as they sold.

It would appear that nothing could be clearer and more completely self-evident than that an agent who has a contract to develop land for an owner cannot by that reason be treated and awarded damages as an owner.

BRIEF ON SPECIFICATION OF ERROR NO. 3

The question of the trial court's award of alleged damages of $3,591.00 to Vermilion is substantially the same as that raised in State v. Mouledous, 199 So.(2d) 185, 192-193 (1967) in which the landowner's claim for damages were rejected in the expropriation of other land belonging to the defendant there.

The grave injustice done the Department in such an award lies in the fact the issue of whether the damage was actually done or, if done, was compensable, was never joined, and this is highlighted by the fact that the trial court substantially sustained the State's peremptory exception on this when he refused to admit testimony by the defendant, even though it did come in under proffer.

The damage was alleged to have been caused by the temporary interference with the access to the property, which is a type of damage not generally classed as compensable under eminent domain.

BRIEF ON ASSIGNMENT OF ERROR NO. 4

This alternative argument is made as to valuation if this Court should disagree with the above.

The trial court's award for the undeveloped land which was expropriated and which was owned by the defendants was based upon the speculation as to what the land would sell for in developed lots and this approach is exactly the one rejected by this Court in Parish of Iberia v. Cook, 238 La. 697, 116 So.(2d) 491, 496 (1959).

In the Cook Case, supra, this court thoroughly digested the jurisprudence on this point, citing many cases by this court which it summarized as:

> ".....we hold that contemplated subsequent subdivision of property and sale of lots after expenditure of considerable sums on improvements cannot serve as a basis of valuation at date of institution of expropriation, such hopes and plans partaking too much of the character of speculation." (Emphasis added)

This Court in the same Cook Case on the same point, in rejecting exactly the basis of valuation accepted here by the trial court and the Court of Appeal, said:

> "The owner's plans or hopes for the future should be held completely irrelevant, being more often illusory than real. Situations may arise where land is actually available for commercial development, as subdivided lots. The measure of compensation in such instances should not be the aggregate of the prices of the lots into which the tract could be divided, for so many contingencies may intervene as to make such measure of compensation too uncertain and conjectural. The test is the market value of the land as a whole, taking into consideration its value for building purposes of a not too speculative nature." (Emphasis added)

This Court continued, " of most importance in determining market value are sales of similar properties in the vicinity of that sought to be expropriated."

There is very little to be said to show why the trial court and the Court of Appeal awarded approximately $10,000.00 per acre to a corn field other than the fact that the

defendants were able to find an appraiser who would testify that the corn field would be valued by a purchaser (the market value) as lots just because it was included in a "subdivision plan" even though no development had taken place.

I see no way the defendants' appraiser could distinguish the value of the corn field within the mapped area at $10,000.00 per acre from the corn field adjacent to it at $3,200.00 per acre. I ask the Court to look at the appraiser's painfully clumsy effort to explain this (Testimony 568-569).

It is my considered opinion that both lower Courts' acceptance of the defendants' evaluation of the corn field is squarely in conflict with the Cook Case, of which it is accurate to say that the landowner sought to value the expropriated property as lots which should be rejected as an ".....owner's plans or hopes for the future.....(and)..... completely irrelevent, ...being more.....illusory than real."

In this case, the landowners had the right to develop and sell the area and had been attempting to sell the portion of the area they already owned as lots since 1958 (6 years at the time of the expropriation) and had not considered it desirable to pay $2,000.00 per acre for it until they learned it was to be expropriated, which they obviously would have been happy to do, had it actually been worth $10,000.00 per acre, as was estimated by defendants' appraiser, Mr. Angers, which was the award made by the trial court, and approved to a large extent by the Court of Appeal.

I admit that this highly optimistic approach by Mr. Angers is not an unusual appraisal approach, and that although Mr. Chappuis used substantially the same method to test his acreage approach with a substantially different result, the trial court's acceptance of Mr. Angers' appraisal of the part taken is manifestly erroneous not only as "illusory" but also in that it assumes that all can be developed and sold on the day it was expropriated when their own testimony shows that they had sold less than remained and that it had taken them six years to do it. Mr. Angers could and did very happily compute the delay in developing and selling the remainder for five years

and call this damage but he failed to use this same sort of discount to reduce the value of expropriated lots to reflect the inescapable delay in developing and marketing the lots. This is obviously serious and manifest error.

And now we come to the problem of comparing in detail the appraisal made by Mr. Chappuis and that made by Mr. Angers, the latter of which was adopted by the Court.

As is shown in the statement of the case and the tabular arrangement made a part of it, there is no really significant difference in the defendants' appraisal by Angers, the Court's award, and that made by the State's appraiser, Chappuis, as to Parcels 6-1-R-1 through 6-36. And this is substantially true as to Parcel 518 except as to damages, in which the two appraisers treated the remainder as a different area.

But for the purpose of comparison of the area in which the great divergence in value is to be found it is probably best understood as all the area west of the Parcels 6-34, 6-35 and 6-36.

In this area (Parcels 6-30 through 518), the State's appraiser fixed the value of the part taken as $46,700.00 and the defendants' appraiser and the trial court fixed the value as $80,541.00.

This astounding difference lies almost entirely in the fact that Mr. Chappuis fixed the value of the undeveloped portion of the land taken by comparison with the sales of other undeveloped potential subdivision properties, while Mr. Angers' estimate assumes an instantaneous sale of all the property in fully developed subdivision lots. I do not see how this estimate could be given serious consideration and it actually is contradicted by Mr. Angers' methods of computing damages (delay in development and sale of lots) invalid really for either.

But the trial court not only gives it serious consideration, he adopted it in toto and it was only slightly reduced by the Court of Appeal.

BRIEF ON SPECIFICATION OF ERROR NO. 5

The Court of Appeal's affirming of the trial court's award of $45,763.00 (on land most of which defendants did not own - - see Error 2 above) is based upon speculation as to delay in development and is thus squarely contrary to this Court's recent ruling that damages must be determined by a comparison of the before and after values. State v. Mason, 254 La. 1035, 229 So.(2d) 89 (1969).

To better understand this problem, it seems appropriate to make a comparison of the estimates of damage to the remainder, as estimated by Mr. Chappuis and as estimated by Mr. Angers, the latter of which was adopted by the trial court.

To see a graphic representation of the areas treated by Mr. Chappuis in his damage study, please refer to the copy (Exhibit No._____) of his appraisal report in the record and turn to the first map in addenda showing the part taken in orange and the remainder in green. He treated the entire area owned by defendants west of the developed lots, the parcels show above, not including Parcel 518, as having a before value of $3,500.00 per acre and an after value in the north remainder of $2,500.00 per acre on 8.3 acres, a damage of $8,300.00, and $1,000.00 per acre on 2.03 acres, the "step like" area left after the taking from the 61 lot purchase, a damage of $5,075.00, a total of $13,375.00 but which he called $13,360.00, arrived at by various "rounding" of individual totals.

Mr. Angers' estimate of damages to the remainder, and I think that nowhere can wilder speculation be found in any appraisal, contains very obvious and very definitely manifest errors, all of which were adopted by the trial court, and substantially adopted by the Court of Appeal.

Mr. Angers' first error, and that of the trial court, in his estimate of $43,650.00, is caused by the same error made in the valuation of the part taken: valuing a corn field as developed subdivision lots in demand as such.

Mr. Angers' next error, and that the trial court, is found in the fact that he assigned "damage" to the defendants on property they do not own but only have the right to develop (profitable) and pay $2,000.00 per acre

for it, at such time as the orderly development of the proposed subdivision may make necessary (p. 530). Mr. Angers' error is based on his legal opinion that the development contract is an "agency coupled with an interest," which, of course, was adopted by the trial court and which is clearly manifest error, but it is one made also by the Court of Appeal.

Mr. Angers was then able to decide that the undeveloped land which the defendants did not own was worth $7,601.00 per acre (no comparables to show this) before the highway construction for five years and that this would result in a reduction in value by 25% (pp. 532-534).

Defendants' appraiser made the same erroneous estimate of damage which has recently been rejected by our Supreme Court in State v. Mason, supra, decided November 10, 1969.[5] He failed to base damages on the "before and after" rule.

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5 "The rule is stated by this Court in State v. Central Realty Investment Company, 238 La. 965, 117 So. (2d) 261, as follows:

"It is well settled in our jurisprudence that damages allowable under Section 2 Article 1 of the Constitution of 1921, resulting from expropriation of property rights is the difference between the market value of the property for sale or rental purposes immediately before and immediately after the expropriation. Harrison v. Louisiana Highway Commission, 101 La 839, 188 So. 354; American Tel. & Tel. Co. of Louisiana v. Maguire, 219 La. 740, 54 So.(2d) 4 and Texas Pine Line Company v. Barbe, 229 La. 191, 85 So.(2d) 260.

"See also State v. Hub Realty Company, 239 La. 154, 118 So. (2d) 354 (1960). Nichols on Eminent Domain, 3rd Ed., in Vol. 4, states the rule thusly:

" 'Section 14.232. Before and after rule.

" " " * * the measure of compensation when part of a tract is taken is the difference between the fair market value of the whole tract before the taking and the fair market value of what remains after the taking.'

"Louisiana cases cited in support of the foregoing text are American Tel. & Tel. Co. of Louisiana v. Maguire, 219 La. 740, 54 So.(2d) 4; Parish of Lafayette, etc. v. Hernandez, 232 La. 1, 93 So.(2d) 672; Efurd v. City of Shreveport, 235 La. 555, 105 So. (2d) 219; and State v. Central Realty Investment Company, 238 La. 965, 117 So.(2d) 261." State v. Mason, Sup. Ct. November 10, 1969 (not yet reported).

Throughout this mumbo-jumbo about a five year delay, he neglected to notice that the same rate of development of the subdivision from 1953 to 1964, which took defendants west only to May Street, would have gotten them to this remainder many years later than his estimated five year delay. In other words there would be no delay which could be attributed to the highway construction.

By the utilization of the theory of a five year delay, as caused by the highway construction, Mr. Angers decided that the 25% damages amounted to $27,601.00 to the north remainder, not owned by defendants, and $6,679.00 to that owned by the defendants, to that portion of the platted subdivision, and this damage was awarded to the defendants by the trial court, and approved by the Court of Appeal. (At this point, it should be pointed out again that the defendants did not own the property and conceivably never would. They only had the right to develop it and certainly could avoid that if they really felt that the property had been damaged or otherwise decided it was unprofitable). Of course, the State's appraiser did not estimate damage to property not owned by the defendants.

Mr. Angers then estimated $11,483.00 damages to the lots owned by the defendants, both those they acquired in the normal course of their business (maybe) and the 61 lots they acquired along the proposed highway right of way, a portion of which lots were expropriated.

On the area in the platted subdivision not owned by the defendants, Mr. Chappuis fixed no damage and he estimated damage of $1,985.00 on the lots owned by defendants and parts of which were left after the taking of Parcels 6-14R-1 through 6-36.

The accumulated errors made by Mr. Angers for the defendants, account for the errors of the trial court and explain why the State's estimate in this area was $13,360.00 and that of Mr. Angers and the Court, $43,650.00.

And it is in these two areas of evaluation, both as to the part taken and the damages to the remainder, that this Court must resolve the trial court's errors and those of the Court of Appeal.

SUMMARY

In summary, it is submitted that this case presents the standard evaluation conflict in expropriation cases in which both sides contend they are basing their conclusions on sales, but upon widely differing sales: raw land suitable for subdivision on one hand and developed subdivision lots on the other. On this problem, I realize that the resolution is largely a matter of expert opinion and one which is often settled by the appellate court as a manifest error problem. And on this there is certainly room for honest differences of opinion.

But there are three very serious legal issues involved in these two cases and they pose the most serious problems for this Court: (1) the effect on the fixing of just compensation by the fact that the landowner bought land and built houses within what he knew to be the highway right of way, but did this before it was expropriated; (2) the awarding of damages to defendants allegedly suffered by land which they did not own but did have a right to develop under a development contract; and (3) the award of damages allegedly suffered by property owned by defendants but not involved in the suits.

I submit that the trial court grievously erred in each of the legal questions, as did the Court of Appeal, in the application of its rule, and, if this Court agrees, the (fact) error of method of evaluation made by the trial court and the Court of Appeal is not involved.

I further submit that, if this Court agrees with the trial court on these facts or the Court of Appeal on the legal questions or the facts, this Court has facts enough in the record and pointed out above to see the Court's error in excess valuation as to the case involving Charles A. Patout et al., and to approve the award in the case of Vermilion Development Company, Inc., except the inclusion of damages to property not involved in the suit.

WHEREFORE, the premises considered, plaintiff, petitioner herein, prays that, after due proceedings, the judgments of the Court of Appeal, Third Circuit, dated March 12, 1970, and two Per Curiams be amended to fix just compensation to the defendants, Charles A. Patout and Lawrence C. Richard (3014 in the Court of Appeal) at

$34,830.00, and to the defendant, Vermilion Development Company, Inc., (3015 in the Court of Appeal) at $18,074.00, and ordering the defendants to return to the plaintiff all which was paid to them in excess of awards, together with interest at the rate of 7% per annum from the date defendants received the excess to the date it is returned to plaintiff.

BY ATTORNEYS,

D. ROSS BANISTER
CHESTER E. MARTIN
JOHNIE E. BRANCH, JR.

BY _____
CHESTER E. MARTIN
Of Counsel

CERTIFICATE

A copy of the foregoing was mailed this date to Mr. Frank Smith, Post Office Box 2609, Lafayette, Louisiana 70501, attorney for the defendants.

Baton Rouge, Louisiana, March 12, 1971.

_____
CHESTER E. MARTIN